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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 DANIEL LEE THORNBERRY,
12 Petitioner,
13 v.
14 SCOTT KERNAN, Secretary of the
15 California Department of Corrections and
16 Rehabilitation,
17 Respondent.
18

Case No.: 16cv2083 BAS (NLS)

**REPORT AND
RECOMMENDATION FOR ORDER
GRANTING RESPONDENT'S
MOTION TO DISMISS**

[ECF No. 64]

19 On May 25, 2017, Petitioner Daniel Thornberry ("Thornberry"), proceeding *pro se*
20 and *in forma pauperis*, filed a second amended petition for writ of habeas corpus alleging
21 that he is entitled to resentencing under California Proposition 47. ECF No. 61.
22 Respondent filed a motion to dismiss, arguing that Thornberry fails to state a federal
23 claim. ECF No. 64-1. On June 30, 2017, Thornberry opposed the motion [ECF No. 72]
24 and the Court took the matter under submission.¹ For the following reasons, the Court
25 **RECOMMENDS** that the district judge **GRANT** the motion to dismiss.
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28 ¹ On June 30, 2017, Thornberry filed a Motion for Leave to Exceed the Ten (10) Page Limit for Filing
Petitioner's Opposition to Respondent's Motion to Dismiss. ECF No. 72. Attached to this filing was an

1 **I. RELEVANT BACKGROUND**

2 On October 8, 2010, Thornberry pled guilty to one count of robbery. Lodgment 1;
3 Lodgment 6 at 1. He admitted allegations that he had two prior convictions for bank
4 robbery, which qualified as serious felonies and strikes. Id. The sentencing court
5 dismissed the allegations regarding one of the strikes. Lodgment 6 at 1. Thornberry was
6 sentenced to fourteen years in prison. Id. He did not file a direct appeal of that
7 conviction. Id.

8 On March 30, 2015, Thornberry filed a habeas petition in San Diego County
9 Superior Court asking that the court resentence him under Proposition 47. Lodgment 3.
10 Proposition 47 was a ballot initiative passed by California voters in 2014, which allowed
11 certain felony drug possession and theft convictions to be reduced to misdemeanors upon
12 application to the state trial court.² The superior court denied the petition, noting that
13 Thornberry had not filed a petition for sentence modification with the court, but that even
14 if he had, it would have been denied because his commitment offense is not one of the
15 crimes covered by Proposition 47. Lodgment 4.

16 Thereafter, Thornberry filed a habeas petition in the California Court of Appeal,
17 again seeking resentencing under Proposition 47 and also arguing that classifying his
18 offense as robbery, as opposed to theft, violated the equal protection clause of the
19 Fourteenth Amendment. Lodgment 5. On June 8, 2015, the appellate court denied the
20 petition on the grounds that the superior court's order was appealable and Thornberry did
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25 opposition brief. Id. Because this document was filed so far in advance of the August 31, 2017 deadline
26 for opposing Respondent's motion (see ECF No. 62, court order setting deadline), and to ensure
27 Thornberry had sufficient opportunity to respond, the Court granted Thornberry's motion for leave to
28 file excess pages and confirmed that Thornberry had until August 31, 2017 to file an opposition. ECF
No. 73. Thornberry filed no other opposition by the deadline, so the Court will address Thornberry's
June 30, 2017 opposition brief as the operative response.

² Proposition 47 was codified as California Penal Code § 1170.18 and became effective on November 5, 2014.

1 not appeal it, and also because Thornberry was not eligible to be resentenced under
2 Proposition 47. Lodgment 6.

3 Thornberry then filed a petition for review in the California Supreme Court.³ The
4 court denied the petition without citation on August 12, 2015. Lodgment 7.

5 In his initial petition for habeas corpus in this Court, Thornberry admitted that
6 three of his four claims were unexhausted. ECF Nos. 1, 3. After voluntarily withdrawing
7 the three unexhausted claims, Thornberry filed an amended petition containing one claim
8 that Thornberry's due process and equal protection rights were violated when he was
9 excluded from eligibility for relief under Proposition 47. ECF No. 36 at 12.

10 Thornberry then moved to further amend his petition. ECF No. 27. The Court
11 granted his motion and Thornberry filed a Second Amended Petition on May 25, 2017.
12 ECF No. 61. In the operative pleading, Thornberry claims that he is entitled to
13 resentencing under Proposition 47 and that the denial of resentencing violated his federal
14 due process and equal protection rights.⁴ Id. at 17.

15 **II. LEGAL STANDARD**

16 A federal court "shall entertain an application for a writ of habeas corpus in behalf
17 of a person in custody pursuant to the judgment of a State court only on the ground he is
18 in custody in violation of the Constitution or laws or treaties of the United States." 28
19 U.S.C. § 2254(a). Federal habeas courts may not "reexamine state-court determinations
20 on state-law questions." Estelle v. McGuire, 502 U.S. 62, 68 (1991); see also Bradshaw
21 v. Richey, 546 U.S. 74, 76 (2006) ("[A] state court's interpretation of state law, including
22 one announced on direct appeal of the challenged conviction, binds a federal court sitting
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25 ³ The Court does not have a copy of this petition. Respondent explains that "[t]he state supreme court
26 was unable to fulfill Respondent's request for a copy of Thornberry's petition because it did not have the
27 petition in its file." ECF No. 64-1 at 2 n.1. Petitioner's statements in his opposition suggest that he
28 raised the same issues as in his prior petitions.

⁴ It appears Thornberry opted not to include the selective prosecution claim and *ex post facto* claim
listed in his proposed supplemental petition [ECF No. 27], despite the district judge having granted him
the opportunity to include these claims in his Second Amended Petition. See ECF No. 58 at 6.

1 in habeas corpus”). If no federal claim is implicated then the petition must be dismissed.
2 See Rule 4, 28 U.S.C. foll. § 2254 (the court “must dismiss” a habeas petition “[i]f it
3 plainly appears from the petition and any attached exhibits that the petitioner is not
4 entitled to relief in the district court”).

5 **III. DISCUSSION**

6 Thornberry argues that he is entitled to resentencing under Proposition 47 and that
7 the denial of such relief violates his federal due process and equal protection rights. ECF
8 No. 61 at 17. Specifically, he contends that if the state courts had looked at the specific
9 conduct underlying his robbery conviction, they would have seen that it was non-violent
10 and thus, comparable in nature to crimes covered by § 1170.18. Id. at 16-17. Thornberry
11 argues that the state courts’ failure to make such an inquiry into the circumstances of his
12 conviction violated his due process rights. Id. Similarly, the crux of Thornberry’s equal
13 protection claim appears to be that, because the robbery he committed was non-violent,
14 his conviction is similar to some of the theft crimes eligible for resentencing under
15 Proposition 47 and, thus, he is being treated differently from similarly-situated
16 individuals in being denied resentencing. Id. at 17. These arguments are not cognizable
17 on federal habeas review. What Thornberry is asserting is that the state courts
18 improperly construed the scope and applicability of state laws—both Penal Code § 211
19 (which defines robbery) and Proposition 47. But it is not the province of federal courts to
20 re-evaluate state court decisions on state law questions in the context of federal habeas
21 review. Estelle, 502 U.S. at 68; see also Medley v. Runnels, 506 F.3d 857, 862 (9th Cir.
22 2007) (“a federal court may not overturn a conviction simply because the state court
23 misinterprets state law”); Wynn v. Bunnell, 12 F.3d 1111 (9th Cir. 1993) (quoting
24 Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985)) (“[a] writ of habeas corpus is
25 available under 28 U.S.C. § 2254(a) only on the basis of some transgression of federal
26 law binding on the state courts. It is unavailable for alleged error in the interpretation or
27 application of state law”). Moreover, the fact that Thornberry appended references to
28 federal due process and equal protection rights to his claim does not transform it into a

1 federal claim. See Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996) (“Langford
2 may not, however, transform a state-law issue into a federal one merely by asserting a
3 violation of due process”); Little v. Crawford, 449 F.3d 1075, 1081–82 (9th Cir. 2006)
4 (concluding that a claim alleging misapplication of state law by a state court did not give
5 rise to an equal protection claim).

6 Numerous other courts in this circuit have addressed this issue and similarly held
7 that a state court’s refusal to reduce a petitioner’s sentence pursuant to Proposition 47 is
8 not a federal claim that is cognizable on federal habeas review. See, e.g., Shell v.
9 Rackley, 16cv2320, 2017 WL 3021067, at *5 (S.D. Cal. Jul. 17, 2017), Report and
10 Recommendation adopted at 2017 WL 3605339 (S.D. Cal. Aug. 22, 2017) (“[h]ere,
11 although Petitioner labels his claims as federal ‘due process’ and ‘equal protection’
12 claims, Petitioner has effectively asked this Court to find that a California state court
13 erred in interpreting and applying California state law. Such a claim is not cognizable in
14 federal habeas corpus”); McKinney v. Pfeiffer, CV15-05268, 2017 WL 1078441, at *4
15 (C.D. Cal. Jan. 11, 2017), Report and Recommendation adopted at 2017 WL 1073340
16 (C.D. Cal. Mar. 21, 2017) (same); Miles v. Rackley, 16cv0278, 2016 WL 6298408, at *2
17 (E.D. Cal. Oct. 27, 2016), Report and Recommendation adopted at 2016 WL 7212801
18 (E.D. Cal. Dec. 12, 2016) (same); Adams v. Borders, No. ED CV16-005, 2016 WL
19 4523163, at *3 (C.D. Cal. Jul. 29, 2016), Report and Recommendation adopted at, 2016
20 WL 4520906 (C.D. Cal. Aug. 29, 2016) (same). Absent a cognizable federal claim, the
21 petition must be dismissed.⁵

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24 ⁵ Even if this Court were able to address Thornberry’s claim that his robbery conviction under California
25 Penal Code § 211 fundamentally is the same as a theft crime, his argument fails on the merits.
26 Proposition 47 provides that “[a] person who, on November 5, 2014, was serving a sentence for a
27 conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a
28 misdemeanor under the act that added this section (‘this act’) had this act been in effect at the time of the
offense may petition for a recall of sentence before the trial court that entered the judgment of
conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377
of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as
those sections have been amended or added by this act.” Cal. Penal Code § 1170.18. The California

1 In his opposition, Thornberry attempts to reframe his arguments. Thornberry first
2 argues that he sought to have his conviction and sentence vacated at the state level
3 (versus simply requesting that he be resentenced under California Penal Code § 1170.18),
4 because changes in the theft statute “rendered his offense conduct improperly and
5 illegally classified as the law now stands.” ECF No. 72 at 6. However this is not true
6 because nothing in Proposition 47 changed the elements of Penal Code § 211 so there is
7 no evidence that Thornberry’s conduct does not still satisfy the elements for robbery. He
8 simply believes that the state courts should have downgraded his conviction from robbery
9 to theft, which again, is not a claim that is cognizable on federal review. To the extent
10 Thornberry implies that he never should have been charged with robbery, the Court notes
11 that it was within the state prosecutor’s discretion to charge Thornberry with the most
12 serious, provable offense. See Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (“[i]n
13 our system, so long as the prosecutor has probable cause to believe that the accused
14 committed an offense defined by statute, the decision whether or not to prosecute, and
15 what charge to file ... generally rests entirely in his discretion”); Nunes v. Ramirez-
16 Palmer, 485 F.3d 432, 441 (9th Cir. 2007). Thus, these arguments do not support a
17 finding that Thornberry is in custody in violation of federal law. 28 U.S.C. § 2254(a).

21 Court of Appeal has rejected applying Proposition 47 to crimes not specifically enumerated in this
22 section, explaining that “[o]mission of [a] crime as one of the listed crimes eligible for resentencing . . .
23 reflect that [the crime] was not intended to be one of the crimes eligible for resentencing.” People v.
24 Bush, 245 Cal. App. 4th 992, 1005 (4th Dist. 2016). Likewise, the court of appeal has rejected attempts
25 to equate more serious crimes with less egregious crimes. Bush, 245 Cal. App. 4th at 1005 (refusing to
26 equate a conviction of theft from an elder – a statute intended to punish offenders who prey on
27 dependent adults and vulnerable elders – with petty theft). Finally, the theft crimes specifically listed in
28 Proposition 47 all require that the amount stolen be less than \$950. Thornberry does not refute the
finding that he took \$2,500 from the bank. See Lodgment 3, Ex. B at 56 ¶¶ 1-24 (teller’s testimony that
she gave Thornberry \$2,500 and he left the bank). His claim, therefore, fails on the merits. See
Bowman v. Perry, 15cv1235-BAS (KSC), 2016 WL 4013675, at *6 (S.D. Cal. Jul. 27, 2016) (noting
that Proposition 47 does not apply to robbery convictions).

1 Thornberry next argues that his case does not, in fact, involve simply a state
2 procedural issue, but rather deprivation of a substantive state law entitlement. ECF No.
3 72 at 9. He cites to Hicks v. Oklahoma, 447 U.S. 343, 346 (1980), wherein the Court
4 noted:

5 Where, however, a State has provided for the imposition of criminal
6 punishment in the discretion of the trial jury, it is not correct to say that the
7 defendant's interest in the exercise of that discretion is merely a matter of
8 state procedural law. The defendant in such a case has a substantial and
9 legitimate expectation that he will be deprived of his liberty only to the
10 extent determined by the jury in the exercise of its statutory discretion, and
that liberty interest is one that the Fourteenth Amendment preserves against
arbitrary deprivation by the State.

11 This argument fails for two reasons. First, Thornberry is not *entitled* under the language
12 of Proposition 47 to have his conviction downgraded from robbery to theft, and there is
13 no due process right to be charged with a lesser offense. Second, Hicks involved a
14 defendant who was sentenced to a mandatory forty years of imprisonment under a
15 habitual offender statute that subsequently was declared unconstitutional. Hicks, 447
16 U.S. at 344. The Supreme Court concluded that mandatory application of the statute had
17 deprived Hicks of his right to have a jury exercise its discretion in determining his
18 punishment. Id. at 347. Such is not the case here where the continued legality of
19 Thornberry's robbery conviction and sentence have not been called into question and
20 where Proposition 47 on its face does not apply to robbery convictions. The state courts
21 do not have discretion to reduce sentences for crimes that are not enumerated in
22 Proposition 47, see Bush, 245 Cal. App. 4th at 1005 (declining to apply Proposition 47 to
23 crimes not listed in the statute), and neither does this Court. Therefore, the Court finds
24 that citation to Hicks does not transform a non-cognizable state law claim into a federal
25 claim under the Fourteenth Amendment.

26 Because Thornberry's claim is not one appropriate for review by this Court, the
27 Court **RECOMMENDS** that Respondent's motion to dismiss be **GRANTED**.

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1 **IV. CONCLUSION**

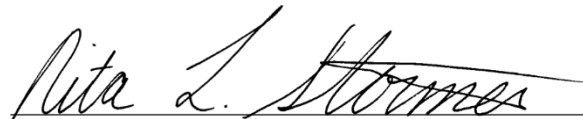
2 For the reasons set forth above, the Court **RECOMMENDS** that the district judge
3 **GRANT** Respondent's motion and dismiss the Second Amended Petition.

4 This report and recommendation is submitted to the United States District Judge
5 assigned to this case pursuant to 28 U.S.C. § 636(b)(1). **IT IS ORDERED** that no later
6 than **October 6, 2017**, any party to this action may file written objections with the court
7 and serve a copy on all parties. The document should be captioned "Objections to Report
8 and Recommendation."

9 **IT IS FURTHER ORDERED** that any reply to the objections must be filed with
10 the court and served on all parties no later than **October 16, 2017**. The parties are
11 advised that failure to file objections within the specified time may waive the right to
12 raise those objections on appeal of the Court's order. *Martinez v. Ylst*, 951 F.2d 1153
13 (9th Cir. 1991).

14 **IT IS SO ORDERED.**

15 Dated: September 15, 2017

A handwritten signature in black ink, reading "Nita L. Stormes", written over a horizontal line.

Hon. Nita L. Stormes
United States Magistrate Judge